LIBRARY
SUPREME COURT, U.S.

No. 387

SEP 20 1957
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

JOHN ROBERT JOLLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	5
Conclusion	9

CITATIONS

Cases:

Agnello v. *United States*, 269 U.S. 20	7
Benton v. *United States*, 70 F. 2d 24, certiorari denied, 292 U.S. 642	9
Gibson v. *United States*, 149 F. 2d 381, certiorari denied *sub nom. O'Kelley* v. *United States*, 326 U.S. 724	9
Harris v. *United States*, 331 U.S. 145	7
Johnson v. *United States*, 333 U.S. 10	7
Lane v. *United States*, 148 F. 2d 816, certiorari denied, 326 U.S. 720	9
Love v. *United States*, 170 F. 2d 32, certiorari denied, 336 U. S. 912	9
Marron v. *United States*, 275 U.S. 192	7
McDonald v. *United States*, 335 U.S. 451	7
Paper v. *United States*, 53 F. 2d 184	7, 9
Parks v. *United States*, 76 F. 2d 709, certiorari denied, 296 U.S. 573	9
Trupiano v. *United States*, 334 U.S. 699	7
United States v. *Rabinowitz*, 339 U.S. 56	7

Statutes:

26 U.S.C. 2810	2
26 U.S.C. 2833	2
26 U.S.C. 2834	2
26 U.S.C. 3321	2

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 387

JOHN ROBERT JOINES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 26-27) is not yet reported. The memorandum opinion of the District Court denying petitioner's motion to suppress (R. 4b-7b) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 25, 1957 (Pet. 28-29). A petition for rehearing was denied July 23, 1957. The petition for a writ of certiorari was filed on August 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal officers, searching for a person in his home to execute a valid warrant for his arrest, could seize and use as evidence a still found in the house.

STATEMENT

A four-count indictment was filed in the United States District Court for the Middle District of Pennsylvania charging that on December 13, 1954, petitioner committed various violations of the internal revenue laws relating to liquor (26 U.S.C. 2833, 2810, 2834, and 3321) (R. 4a-5a). Before trial, petitioner moved to suppress certain evidence that was taken from his home on December 13, 1954, on the ground that the seizure was unlawful (R. 6a-8a). Upon a hearing (R. 13a-28a) the court filed a memorandum opinion denying the motion (R. 4b-7b). Petitioner renewed his motion to suppress at the beginning (R. 38a) and at the end of his trial but it was again overruled (R. 66a). He presented no defense (R. 66a). The court found petitioner guilty as charged in the indictment (R. 49b) and imposed a general sentence of two years in prison (Pet. 8). In a *per curiam* opinion, the judgment was affirmed by the Court of Appeals for the Third Circuit (Pet. 26-27).

The evidence adduced by the government may be summarized as follows:

In September, 1954, agents of the Bureau of Internal Revenue began an investigation of petitioner for the illegal operation of a whiskey still (R. 28b-29b). They observed what appeared to be 100-pound bags of sugar being either loaded or unloaded at petitioner's farm house and also saw known violators visit petitioner (R. 29b-30b). On November 19, 1954, the agents saw

a panel truck loaded with cartons similar to those used by bootleggers to transport whiskey leave petitioner's Pennsylvania farm (R. 30b-31b). The agents followed the truck and stopped it in Maryland. It contained 404 gallons of "moonshine" whiskey. Petitioner was not in the truck but it was registered in his name (R. 32b). These factors led the officers to believe petitioner's home was a storage place for raw materials and a distributing point for the finished product (R. 34b). On November 22, 1954, a warrant was issued by the United States Commissioner in Baltimore, Maryland, upon the affidavit of the chief agent, for the arrest of petitioner for removing, depositing and concealing non-tax paid whiskey (R. 33b).

At the time the officers obtained the warrant they had not yet located the still which was the source of the illegal whiskey. They thought it inconceivable that the still would be located in petitioner's home, as it was generally considered too dangerous for a still to be located at the home of an operator, particularly when the home was used to store raw materials (R. 34b, 46b). Concerned over a still which could produce a large volume of whiskey, the agents continued the search for the still before they arrested petitioner so that production of the contraband liquor could be stopped as soon as possible (R. 29b, 33b-34b). After searching diligently for several weeks with negative results, the agents were ordered by their supervisor to arrest petitioner for the violation described in the warrant (R. 34b-35b). On December 13, 1954, four of the agents went to petitioner's home with the warrant and were admitted by petitioner's son and nephew. The agents presented their official credentials and stated that they had a warrant for the arrest of petitioner (R. 13b-14b).

They were told he was not at home. They then proceeded, without opposition, to search the house for him. Petitioner's son corroborated the officers' testimony that they told him they were searching for petitioner (R. 27b). They found a locked door on the first floor which petitioner's son said led to the basement. The son said he did not know where the key was. In the attic, the officers found illegal whiskey in jars (R. 14b). One of the agents testified (R. 14b):

> * * * I went back downstairs and out the back door and I noticed an entrance to a cellar. The door was fairly loose, and I raised it approximately 12 inches and looked in and saw several barrels, sugar bags, and a strong odor of fermenting mash. I asked Investigator Milewski to verify my findings. He looked in and verified it, and he also got the odor. We then pulled the door open, which gave way very easily. I went into the basement and there was an adjoining room to the basement. I went in there looking for Bob Joines, but he was not there, but this large distillery was that [sic] I saw.

It was this evidence that petitioner claimed to have been illegally seized.

The next day petitioner appeared at the United States Commissioner's office with his attorney and submitted to arrest (R. 44b).

The trial court found as a fact that the officers entered petitioner's house in good faith and observed the violations in the course of their search for petitioner. It concluded that, since the officers were lawfully on petitioner's premises, they had a right to seize the evi-

dence (R. 4b-7b). On appeal, the Court of Appeals for the Third Circuit said (Pet. 26):

> * * * We are satisfied from the evidence, as was the trial judge, that the officers searched the defendant's house in a bona fide attempt to find and arrest him and that they did not know of the existence of the still therein until they came upon it in the course of their search for the defendant.

ARGUMENT

1. The burden of petitioner's argument is that the federal officers utilized the warrant for the petitioner's arrest for the purpose of making a search for the still without first obtaining a search warrant. On the evidence presented to it (*supra,* pp. 2-4), the trial court found that the officers were engaged in a *bona fide* attempt to find the petitioner. The court below affirmed this finding (Pet. 26-27). There is no reason for this Court to reexamine this determination which is entirely factual.[1]

---

[1] Although petitioner does not argue the point in his petition, he points out in his statement that one of the agents went to a neighboring town to meet an informant in a last effort to determine the location of the still while the other agents were proceeding to petitioner's house to arrest him (Pet. 6). While keeping his rendezvous with the informant, that agent saw petitioner in the courtroom of the County Court House (R. 47b-48b). For some reason, petitioner suggests that the agent had a duty to arrest petitioner there or at least call the other agents to tell them petitioner was not at home. The same suggestion was put to the agent at the trial by defense counsel and the agent replied that "since his arrest was imminent anyway since Investigator Lorfing had the arrest warrant, and since he had to come back to his place of residence, it would be better if I let the plan go through and let the arrest be effected there without causing a commotion in that Court Room and without possibly as I said before, identifying the person with whom I intended to speak" (R. 48b). We fail to perceive the significance of this incident. If petitioner intends to imply that the

The petitioner also argues that the arrest warrant did not justify a forcible entry into the cellar, where the still was discovered, when the petitioner could have been arrested at an earlier date and without entering his house (Pet. 9-12). However, the record presents a perfectly logical explanation for the delay in executing the arrest warrant (*supra*, pp. 3-4). The entry into the cellar through the outside door was made only after access by an upstairs door had been denied. It was necessary in order to discover whether the petitioner was in the cellar and was not performed with any force in excess of that which was necessary (*supra*, p. 4).

The petitioner's argument that the officers had sufficient information to support a request for a search warrant and, therefore, should not have attempted to make the arrest until they had first obtained such a warrant, is without foundation both legally and factually. Assuming, on the basis of the finding of the two courts below, that the attempt to make the arrest was *bona fide*, the officers were under no legal obligation to obtain a search warrant before they attempted to execute the arrest warrant. Factually, the evidence is that the officers did not believe that the still was to be found on the premises. They would therefore have been acting in bad faith had they attempted to obtain a search warrant on the ground that there was probable cause to believe the still was there.

2. Petitioner's contention that the seizure was unlawful because it was not incidental in time and place to

---

agents planned to visit his home while petitioner was away so they could seize the still, his logic is faulty. The still could have been seized as an incident to petitioner's actual arrest even if he had been home.

the arrest (Pet. 14-19) confuses the situation here with cases where a search is made coincidentally with, or subsequent to, an arrest and as an incident thereto.[2] Here there was no search made for the still, as an incident to an arrest or otherwise; the only search made was for the petitioner in order to arrest him. Having stumbled upon the contraband still in the course of that search, the officers properly seized it and it was, therefore, admissible in evidence. *Marron* v. *United States*, 275 U.S. 192.[3]

The issue involved here has been resolved by the courts before on almost identical facts. In *Paper* v. *United States*, 53 F. 2d 184 (C.A. 4), federal officers were searching the defendant's house to arrest him under a warrant when they discovered contraband liquor in his cellar. The trial court found that the officers were searching in good faith for the defendant and not conducting a search for evidence of crime; consequently the seizure of the liquor was held lawful. In affirming the judgment, the Court of Appeals for the Fourth Circuit said (53 F. 2d at pp. 184-185):

> We think there can be no question but that the evidence was admissible. The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. Olmstead v. United States, 277 U.S. 438 * * *. Most cases of search

---

[2] See *e.g. Agnello* v. *United States*, 269 U.S. 20; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Rabinowitz*, 339 U.S. 56.

[3] Cases dealing with seizures made after entries without a warrant of any kind are not pertinent. See *Johnson* v. *United States*, 333 U.S. 10; *Trupiano* v. *United States*, 334 U.S. 699; *McDonald* v. *United States*, 335 U.S. 451.

in violation of this constitutional provision involve the element of trespass, i.e., the entry without right upon the premises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. * * * But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

* * * * *

In this case the officers had the right to go upon the defendant's premises for the purpose of finding and arresting him. While lawfully there and searching for him in good faith for the purpose of making the arrest, and not as a pretext for searching the premises for evidence of crime, they discovered that a crime was being committed in their presence. This discovery did not render their search unreasonable or unlawful; and there is no reason in law or in common sense why their testimony as to the crime whose commission they discovered should be excluded.

The same conclusion was reached on the same facts by the Court of Appeals for the Fifth Circuit in *Lane* v. *United States,* 148 F. 2d 816, certiorari denied, 326 U.S. 720. The *Paper* decision was followed in *Love* v. *United States,* 170 F. 2d 32 (C.A. 4), certiorari denied, 336 U.S. 912, even though in the *Love* case the evidence used against the defendant was found in his home by officers searching there under a warrant for the arrest of another person who did not live there. See also *Parks* v. *United States,* 76 F. 2d 709 (C.A. 5), certiorari denied, 296 U.S. 573; *Benton* v. *United States,* 70 F. 2d 24 (C.A. 4), certiorari denied, 292 U.S. 642; see *Gibson* v. *United States,* 149 F. 2d 381, 383-384 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United States,* 326 U.S. 724.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ALBERT M. CHRISTOPHER,
Attorneys.

SEPTEMBER 1957.

☆ U. S. GOVERNMENT PRINTING OFFICE 1957 456008 3-3